Supreme Court, U. S.
FILED
APR 20 1978
MICHAEL RODAK, JR., CLERK

No. 77-1144

In the Supreme Court of the United States

OCTOBER TERM, 1977

W. EARL DUNCAN, ET AL., PETITIONERS

v.

FURROW AUCTION COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners, four persons operating as a group called Columbus Developers, Inc., seek review of the court of appeals' determination that 15 U.S.C. 634(b)(1)[1] prohibits issuance of an injunction against the Administrator of the Small Business Administration and his agents.

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[1] 15 U.S.C. 634(b) provides in pertinent part:

> (b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—
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> (1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property;
>
> (2) under regulations prescribed by him, assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions

1. Petitioners own 80 percent of the capital stock of the Auto Vac Company. The assets of Auto Vac were pledged under deeds of trust to secure promissory notes that Auto Vac had given to SBA and another lender, Advancement, Inc. When Auto Vac defaulted on the notes, SBA and Advancement exercised their rights under the deeds of trust and scheduled an auction to sell the assets. The auction was to be conducted by Furrow Auction Company. On the morning scheduled for the auction petitioners offered respondent Glenn Penninger (an employee of the SBA) a check in the amount of Auto Vac's full outstanding debt to SBA and Advancement; petitioners requested, in exchange, an assignment to them of Auto Vac's notes and the deeds of trust. Penninger refused the offer. (Petitioners claim that Penninger previously had assured them that their payment would be accepted.) See Pet. 4-5; Pet. App. 2a.

Petitioners then sought and obtained from a North Carolina state court a temporary restraining order against the foreclosure sales. SBA intervened and then, on Penninger's motion, the case was removed to the United States District Court. After a hearing, the district court dissolved the temporary restraining order, dismissed the complaint against Penninger and the SBA, denied a motion for a preliminary injunction, and remanded the

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and for such consideration as the Administrator shall determine to be reasonable, any evidence of debt, contract, claim, personal property, or security assigned to or held by him in connection with the payment of loans granted under this chapter, and to collect or compromise all obligations assigned to or held by him and all legal or equitable rights accruing to him in connection with the payment of such loans until such time as such obligations may be referred to the Attorney General for suit or collection;

* * * * *

case to the state court (Pet. App. 2a).[2] The court of appeals affirmed, holding that 15 U.S.C. 634(b)(1) prohibits injunctive relief restraining the Administrator of SBA and his agents from foreclosing on SBA's security interests (Pet. App. 1a-4a).

2. This case is moot. The court of appeals did not stay the district court's dissolution of the restraining order and its denial of injunctive relief, and the sale of the property has occurred and the property has been delivered to the purchasers. It is no longer possible to afford petitioners the relief they seek.

In any event, petitioners' arguments are insubstantial. The court of appeals correctly held that any injunction against the auction was barred by 15 U.S.C. 634(b)(1). That statute provides that "no * * * injunction * * * or other similar process * * * shall be issued against the Administrator or his property," and the courts have uniformly held that that provision prohibits injunctions against the Administrator and his agents "[i]n the performance of, and with respect to, the functions, powers, and duties vested in [the Administrator] * * *." See, *e.g.*, *Romeo* v. *United States*, 462 F. 2d 1036, 1038 (C.A. 5), certiorari denied, 410 U.S. 928; *Vincent* v. *Small Business Administration*, 402 F. 2d 769 (C.A. 4); *United States* v. *Mel's Lockers, Inc.*, 346 F. 2d 168 (C.A. 10). As the foregoing cases establish, Section 634(b)(1) prohibits injunctive relief whether or not the claim is that the claim is that the Administrator or his agents unreasonably refused to assign notes or security interests.[3] Petitioners may or may not have a cause of action for

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[2]The state court injunction against Advancement, Inc. was defective for inadequate service of process (Pet. 6; Pet. App. 8a), and the petition therefore does not involve any issue respecting petitioners' rights against Advancement.

[3]As the court of appeals noted (Pet. App. 4a), however, there is nothing to indicate that Penninger's refusal of petitioners' offer to

damages for any unreasonable conduct in violation of Section 634(b)(2), but they have no cause of action for injunctive relief, which was the only relief sought in petitioners' complaint (Pet. 4-5).[4]

Scheuer v. *Rhodes*, 416 U.S. 232, and other cases involving official immunity from damage actions relied on by petitioners (Pet. 13-16), have no bearing on this case. This case involves a suit for injunctive relief that is expressly barred by statute.[5] Moreover, there is no basis for any claim that SBA or its agents were not acting in "the performance of, and with respect to, the functions, powers, and duties vested in [the Administrator] * * *" within the meaning of Section 634(b)(1).

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purchase the notes on the morning of the auction was unreasonable. Petitioners tendered the check (five minutes before the auction) in their individual capacities rather than on behalf of Auto Vac, and they sought assignment of deeds of trust secured not only by the assets of Abto Vac that were to be sold at the auction but also by the farm of another person. The holding of the auction in no way injured any legitimate interests of petitioners in having Auto Vac's debt discharged and their own property interests protected, because they were free to bid at the auction, and in fact they purchased some of the property sold.

[4]*Capital Refrigeration, Inc.* v. *United States*, 375 F. Supp. 462 (M.D. Pa.), cited by petitioners (Pet. 12), dismissed a suit against SBA and did not hold that equitable relief would ever be available.

[5]It is therefore not necessary to defer consideration of the petition pending the disposition of *Butz* v. *Economou*, No. 76-709, argued November 7, 1977, which presents questions concerning the scope of immunity for federal officials from damage claims in the absence of an explicit statute.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.